

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Destiny Hicks and Elijah Brown
Minors/Appellants

Supreme Ct. No. 153786

Ct. of Appeals No. 328870

Wayne Circuit Ct. No. 12-506605

Department of Health and Human Services
Petitioners

v.

Shawanda Brown
Respondent

MINOR CHILDREN'S
Supplemental Brief

APPLICATION FOR LEAVE TO APPEAL

William Ladd P30671
LGAL for Minor Children
Michigan Children's Law Center
One Heritage Place Ste. 210
Southgate, Mi. 48195
Ph. 734 281-1900

Date: 9/8/2016

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Statement of Judgment and Order Appealed From
And Relief Sought

The minor children here seek leave to appeal to this court pursuant to **MCR 7.305(B)** from a decision by the Court of Appeals in **in re Hicks/Brown Minors, ___ Mich App. ___; Dkt.No. 328879 (Released 4/26/16)**. In that decision the Court of Appeals reversed the termination of the respondent-mother's parental rights.

In an order entered by this court on 7/26/16 this court directed the parties to file supplemental briefs to address three issues related to those raised by the children in their earlier Application for Leave to Appeal to this court.

The children ask that this court either grant leave to appeal or peremptorily reverse the decision of the Court of Appeals because that court improperly found that the agency and the trial court had not made proper accommodations of the respondent-mother's claimed disability pursuant to the Americans With Disabilities Act.

Children's Statement of Questions Presented

I. Did The Respondent-Mother Fail to Make a Timely Request for Accommodation of Her Disability in the Case Service Plan Prepared by DHHS Where She Never Specifically Identified Her Disability and She Never Claimed A Violation of the ADA and Respondent Would Not Have Been "Otherwise Qualified" Under the ADA?

Minor Children Answer Yes
 Trial Court Answers Yes
 Court of Appeals Answers No
 Department of Health and Human Services Answers Yes
 Respondent-Mother Answers No

II. Did the DHHS Make Sufficient Reasonable Efforts to Reunify the Family As Required By MCL 712A.19a(2) Given Respondent's Potential Disabilities Where She Was Referred to a Variety of Services and Where She Was Afforded 2 and ½ Years to Complete the Services?

Minor Children Answer Yes
 Trial Court Answers Yes
 Court of Appeals Answers No
 Department of Health and Human Services Answers Yes
 Respondent-Mother Answers No

III. Did The Potential Failure to Provide a Service Plan to Accommodate Respondent's Disability Provide Grounds For Reversal of the Termination Where There Was Sufficient Support For the Trial Court's Findings That Grounds For Termination Had Been Established And That The Termination Was In the Best interests of the Children?

Minor Children Answer No
 Trial Court Answers No
 Court of Appeals Answers Yes
 Department of Health and Human Services Answers No
 Respondent-Mother Answers Yes

Children's Statement of Facts

Original Preliminary Hearing

Destiny Hicks (dob 1/29/12) and Elijah Brown (dob 2/7/13) are the children who are the subjects of this appeal. Destiny came to the attention of the juvenile court (Wayne County Circuit Court's Family Division-Juvenile Section) on 4/11/12 when the court held a preliminary hearing. At that hearing the court was informed that Destiny had been placed outside of her mother's care on 4/10/12. That hearing was continued for the agency to file an amended petition with more specific allegations. The court had determined that Destiny's continued placement in the home was contrary to her welfare because the parents were not able to care for the child and that there was a registered sex offender living in the home. **Order from Preliminary Hearing 4/11/12.** At the continued hearing held on 4/25/12 the Protective Services worker Cordell Huckaby testified that he had met extensively with the mother at his office, that he had attempted to convince the mother to keep Destiny in her care, but she was unwilling to do so because she related that she did not have a suitable home for herself and that there were no suitable relatives to provide a home for either herself or Destiny. The mother was also refusing to accept supportive services to keep Destiny in her care. The court referee authorized the petition and authorized continued placement for Destiny. The court also made a finding that the agency had made reasonable efforts to prevent the removal of the child, based upon the fact that the agency had met with the mother and had made efforts to convince her to keep the child in her care, but these efforts had been unsuccessful. The agency had identified Alberto Hicks as the

putative father and they had assisted him in establishing paternity. **T. 4/25/12, pp. 3-12; Order Following Preliminary Hearing, 4/25/12.**

The Original Adjudication and Disposition

The father filed a demand for a trial by jury. At a pretrial held on 5/21/12 before Judge Christopher Dingell, the court was made aware of the fact that the father might have Native American heritage. The court was hearing the case in tandem with a case entitled *In re Brown*, Ct. No. 12-505,860 and Mr. Hicks was identified as a non-parent adult in that case. **T. 5/21/12, pp. 3-4.** At a subsequent hearing the respondent mother Shwanda Brown was identified as the adult sibling in the companion Brown case. **T. 10/16/12, pp. 3-5.**¹ The issues regarding Indian heritage were resolved as to Mr. Hicks at a hearing held on 11/15/12 where the court admitted a number of documents regarding notice to the identified Indian tribes and the Bureau of Indian Affairs. **T. 11/15/12, pp. 3-9.**

The trial was held on 1/28/13 before Judge Christopher Dingell. At that hearing the agency first withdrew its request for termination of parental rights against the father Mr. Hicks. In response, Hicks withdrew his jury demand. **T. 1/28/13, pp. 3-7.** The respondent-mother did not appear in court for the hearing but she was represented by counsel. Cordell Huckaby, the Protective Services worker testified as the petitioner on behalf of the Department of Human Services (now Department of Health and Human Services or DHHS). Mr. Huckaby testified that in April 2012 the mother had come into his office and stated that she could not

¹ This separate case involved Shwanda Brown's mother as the respondent. (Juv. Ct. Case No. 12-505,860). That case is not at issue here and was not part of the record in this proceeding.

care for her daughter, Destiny. Respondent reported that she was staying with her mother and her children, along with at least two men. Respondent insisted that she could not care for Destiny. Huckaby spent the next to 4 ½ to 5 ½ hours attempting to convince Ms. Brown that she could care for Destiny, but to no avail. During those extensive discussions the mother had stated that she did not have a place to stay and that she knew she could not continue staying with her mother, Cleo Brown (Destiny's maternal grandmother) because the grandmother lived with a convicted felon Steven Butler.² The worker went on to state that the mother admitted that she was overwhelmed with the care of her child, both financially and physically. He also noted that she was "very stressed". **T. 1/28/13, pp. 3,9-11, 16-18.**

Beth Houle, the foster care worker, testified that she had been on the case since 10/24/12. She stated that she had had difficulties establishing contact with the mother and that Ms. Brown's first visit with Destiny was not until 12/12/12, after an extended period without visitations. Respondent had no explanation for her failure to visit. More specifically the Assistant Attorney General asked the worker:

Q-And when's the first time that the mother visited with this child?

A- It was December 12th, 2012.

Q- Okay. And that's not since you took over the case in October, but that dates back to the beginning of the case?

A. Yes

Q- So between the time when the child came into care in April and December 12th, 2012 that approximately eight month period the mother did not visit at all?

A- That's correct.

Q- Did you have—when you spoke to the mother, did you ask her why she'd not been visiting with her baby?

² Butler had been listed as the Non-Parent Adult in the instant case until the allegations had been dismissed at the beginning of the hearing. **T. 1/28/13, pp. 5-7.**

A- I did, and she didn't really have an answer. She did say that she wasn't – she didn't have bus tickets at one point; and I did attempt to send those to her. **T. 1/28/13, p. 27.**

Even after the mother started visitations she was inconsistent, missing 3 of the 7 visits scheduled before the court date on 1/28/13.³ **T. 1/28/13, pp. 34-36.**

When the mother did visit she had difficulties engaging with and supervising Destiny. As a result the worker often had to redirect the mother. Ms. Houle related that at one visit Destiny crawled out of the visitation room and the mother made no effort to stop her. At another visit Destiny had a dirty diaper, and the mother made no effort to change it, instead she merely laughed when the worker showed her where the diapers were. **T. 1/28/13, pp. 27,30,34.**

Ms. Houle stated that the mother had admitted that she had an unstable housing situation. The mother first reported that she lived with her mother, but she moved to stay with her aunt and then she went back to stay with her mother, all within the three months from October to December 2012. Ms. Brown explained that her mother had kicked her out of her home and that the aunt did not have room for her. When she returned to the grandmother's home she was sleeping on the couch. **T. 1/28/13, pp. 28-29.** Following this testimony the trial court found that there was sufficient evidence to support the court taking temporary custody of the children as to both parents. **T. 1/28/13, p. 43.**

The court held a dispositional hearing on 1/29/13 where the court admitted treatment plans as to both Ms. Brown and Mr. Hicks. Brown was present at this

³ The witness testified that the respondent-mother had not visited for the first seven weeks that she was assigned to the case; from 10/24/12 to 12/12/12. Respondent had then missed two more visits between 12/12/12 and 1/24/13. **T. 1/28/13, pp. 34-37.**

hearing. The agency proposed a service plan which required the respondent-mother to: participate in individual therapy, and in a psychological evaluation and follow through with its recommendations. The respondent was asked to attend weekly parenting classes and weekly visitations with Destiny. The agency also asked that respondent maintain regular weekly contact with the agency, that she provide a safe and suitable home for herself and Destiny and that she obtain a legal source of income. On its behalf the agency agreed to provide all the necessary referrals.

Children's Foster Care Parent/Agency Treatment Plan and Service Agreement,

Admitted 1/29/13.⁴ The court adopted a treatment plan for the mother which included requirements that the mother should be involved in parenting classes, that she be in individual counseling, that she participate in a Clinic for Child Study evaluation, that she visit regularly with the children and that she participate in an educational program. The mother was also required to obtain and maintain suitable housing, a legal source of income and obtain prenatal care because she was pregnant. The father Hicks was presented with a similar treatment plan. T.

1/29/13, pp. 3-6.

Adjudication and Disposition For Elijah

Elijah Brown was born on 2/7/13. A petition for temporary custody was authorized on 2/13/13. Alberto Hicks was identified as the putative father. T.

2/26/13, pp. 3-6. A trial in Elijah's case was held on 4/9/13. The mother made

⁴ The Court of Appeals, in its decision below took note of the fact that no services had been offered to respondent until the case was adjudicated against her on 1/28/13. See *In re Hicks/Brown*, ___ Mich App. ___, Dkt. 328870 (Released 4/26/16), slip at p. 2. However, as a matter of law, the court had no authority to adopt a case service plan or to require respondent to participate in services until respondent was adjudicated. See *In re Sanders*, 495 Mich 394 (2014).

admissions at the hearing. She admitted that when Elijah was born she did not have suitable housing and that she still did not have suitable housing at the time of the hearing. These housing problems dated back to at least 2012 when she did not have suitable housing for Destiny. She did state that she had started a treatment plan in Destiny's case and that some of her services had started. She also admitted that she was living in a shelter through Genesis House. Based upon these admissions the court made Elijah a temporary court ward. The court found that Elijah's legal father had not been identified. The court adopted the treatment plan that was in place as to Destiny, and added a requirement that the mother participate in a psychiatric evaluation. The agency did make the court aware that the mother had been referred to parenting classes but she had already been terminated from that service. **T.**

4/9/13, pp. 8-20.

Periodic Review Hearings

The court then embarked on an extensive series of review hearings. For an extended period of time the court attempted to identify a suitable relative caretaker for the children and it set a concurrent plan of guardianship to help accomplish the relative plan. At the first review hearing held on 4/23/13, Joann Brown, a maternal aunt, had been identified as a potential relative caretaker, but she had been ruled out because she did not have suitable housing and there was substance abuse in her home. As to the mother, the agency reported that she remained in the shelter, and she was being referred to Focus Hope which could provide her with a variety of services including job skills training, employment referrals and housing assistance. The agency was also planning to re-refer the mother to parenting classes as soon as

the mother filled out a referral form. She had also been involved in therapy at the agency. **T. 4/23/13, pp. 8-13** In its order the trial court made clear that the case service plan should be set out in priorities for respondent, with visitation with the children coming first; completion of the parenting classes second; and obtaining a legal source of income being third. **Order Following Dispositional**

Review/Permanency Planning Hearing, 4/23/13.

At that hearing the court admitted a Clinic for Child Study evaluation of the mother conducted on 4/19/13 by Dr. Kai Anderson, a psychiatrist. In the report the agency reported that respondent had recently started individual therapy at Franklin Wright Agency and that she was beginning to visit regularly with the children at Franklin Wright. The mother also had a history of depression and had been on medication in the past. The examiner did note that the mother had some difficulty with mathematics, that her memory was impaired and that she had "some cognitive limitations". The report stated that the mother appeared to have some cognitive limitations, but she demonstrated the capacity to think abstractly. **Clinic for Child Study, Admitted 4/23/13.** In conclusion the examiner recommended that:

"Due to her limited support system, concern about her cognitive limitations and her history of depression, Ms. Brown will require additional support during her Court involvement. It is suggested that she be provided with a parent peer mentor in addition to her therapist to provide with additional support." **Clinic for Child Study, Admitted 4/23/13, at p. 6**

At the hearing held on 7/23/13, the foster care worker reported that the mother was sleeping on a couch in her uncle's home. The week before the mother had gone to the agency and told the worker that she did not feel safe in that home. After attempts to place the mother in a shelter proved unsuccessful, she had located

a friend's home to stay, but she did not want to stay there and instead returned to the uncle's home because there were no other relatives willing to have her stay with them, even for a night. At the end of the hearing the court renewed its order for parenting classes, (because the mother had been terminated from an earlier program⁵) and the court ordered that respondent be provided a parent partner requested by her counsel. The court also ordered assistance with respondent looking for a job as well as with prep for the GED, again as requested by her counsel.

T. 7/23/13, pp. 5-10; Order Following Dispositional Review/Permanency Planning Hearing, Filed 7/23/13.

The court also admitted a psychological and a psychiatric evaluation at the 7/23/13 review hearing. In the psychological the examiner noted that she immediately observed cognitive deficits with respondent and that Brown demonstrated limited insight. However Brown presented as an accurate historian and to be in good contact with reality. In the assessment, the examiner found that Brown had a Full Scale IQ of 70, which placed her in the 2nd percentile of intelligence and within the borderline range of intellectual functioning. Her reasoning was also determined to be in the 2nd percentile. As a result of the evaluation the examiner recommended that Brown be involved in individual therapy "... to address underlying emotional distress and other factors that affect Ms. Brown's judgment, parenting skills and daily functioning." The evaluation also recommended that Brown be involved in parenting classes that include role-playing. Finally the report

⁵ In fact respondent had been terminated from two sets of parenting classes; once in March 2013 based upon non-attendance, and again in July 2013. **Updated Court Report, 7/23/13.**

stated that Brown's cognitive skills were very limited and that "... it might be beneficial to administer a measure of adaptive functioning..." to determine strengths and weaknesses. **Psychological Evaluation, Juvenile Assessment Center, 5/9/13, at p. 4.**

In a subsequent psychiatric evaluation the examiner reported that Brown had reported that she was receiving parenting classes through the JAC as well as in-home adult services through Lutheran Child and Family Services. The evaluation took note of the earlier psychological evaluation and the fact that it found that that she had a full scale IQ of 70. The psychiatric evaluation recommended that Brown needed to participate in more parenting classes to improve her ability to provide appropriate parenting to her children, it stated that she could benefit from a parent partner and case management services through a community mental health agency such as NSO or Community Link. **Psychiatric Evaluation, Juvenile Assessment Center, 5/30/13, at p. 4.**

At the hearing held on 10/15/13, the court was informed that the mother had been provided with a parent partner to assist her with parenting issues. The agency worker informed the court that the mother had been referred three separate times for parenting classes, but a new referral was required through no fault of the mother because the referral agency had recently discontinued the service. The mother was also attempting to qualify for SSI (Supplemental Security Income), while she remained living with her uncle. **T. 10/15/13, pp. 6, 10-14.** At the next review hearing held on 1/15/14, the mother had made some progress on the treatment plan. She had completed parenting classes and the worker said that she could refer

the mother for one-on-one parenting classes. The mother had also been referred to Michigan Rehabilitation Services (an agency that provides housing and employment counseling to persons with disabilities). The mother reported that she had her own room in the uncle's home. However, the worker reported that the mother continued to have problems at the visits, needing to be redirected by the workers. Also the uncle had informed the worker that there was not enough space in his home for the children. The mother did continue in therapy and with the parent partner and the worker had assisted the mother in applying for disability. However the mother had also had a recent emergency mental health hospitalization for suicidal ideation. At this point the court continued the concurrent plan of guardianship or reunification. **T. 1/15/14, pp. 5, 9-15, 20.**

Based upon the court's directions the agency continued to investigate potential relative placements. The maternal great-grandmother was found to be too old to be a guardian and the uncle could not care because he lived with a woman who did not want the children placed in her home. The mother had made some progress on the plan and had recently started mental health services at Northeast Guidance Center. **T. 2/13/14, pp. 4-7.** Similarly, in April 2014, the respondent had completed applications for both Section 8 (subsidized) housing and for Michigan Rehabilitation Services (MRS) with the assistance of the case worker. **Updated Court Report, 5/13/14.** Throughout this period in the case the court chose not to order the filing of a termination petition. **T. 2/13/14, p. 12; T. 5/13/14, p. 4.**

At the hearing held on 8/13/14, the new foster care worker Yasmin Gibson testified that while the mother had been referred to Michigan Rehabilitation

Services (MRS), she had not followed up with the documentation. She had also not been in recent contact with the parent partner. The worker was helping the mother with job applications, and the therapist was providing similar assistance. Based upon a request from the mother's counsel the court ordered that the agency refer the mother for services through the Neighborhood Services Organization (NSO).⁶ T. 8/13/14, pp. 6-10, 15. This was the first time in court that counsel had requested these services, but even at this point she had some difficulty explaining what they were:

The Court: Now NSO, what are you talking about?

Ms. Gilfix: -- that was followed through. Well, they provide services, your honor. In fact, I was provided with information from the last worker, for the last two workers ago regarding NSO intake services. And they provide services, parenting and other kind of intense services for parents. And I think that would be something that Ms. Brown would benefit from. T. 8/13/14, p. 13

In response the court did include a referral to NSO as part of its order(s) from the hearing held on 8/13/14. **Order Following Dispositional Review/Permanency Planning Hearing, Filed 8/13/14.**

At the hearing held on 11/7/14, the foster care worker Yasmin Gibson reported that in order to comply with the court's order to pursue a guardianship with the maternal great-grandmother in Ohio she had contacted her several times. The great-grandmother had consistently said that she would not care for the children, given that she was too old. Suddenly, the great-grandmother had changed her position, saying that she would take the children, but she would give them to the

⁶ Neighborhood Service Organization is a local nonprofit agency which provides clinical and outpatient services for adults with mental illness; older adult mental health support, advocacy and outreach; and developmental disability services for adults and children. www.nso-mi.org (accessed 1/22/16).

mother. The agency considered this plan to be a significant risk to the children. The mother had also reported to the worker that she was planning to move to Ohio because she was about to be evicted from her uncle's home. The uncle had informed the worker on several occasions that he planned to put the mother out of his home. **T. 11/7/14, pp. 6-9.** In addition the agency reported that respondent had only attended 8 out of 14 scheduled visits with the children, which included respondent missing one of the two make-up visits offered to her. **Updated Court Report, 11/7/14.**

Ms. Gibson had also made efforts to refer the mother to the Neighborhood Service Organization. However, to do so she needed to have the mother released from her existing services at Carelink.⁷ Ms. Gibson had made a request for the release on behalf of the mother, and she was also planning to help her fill out the application for the NSO.⁸ In addition, Ms. Gibson reported that the mother's therapist had offered to help the mother with her application for subsidized housing but Ms. Brown had said that she would do it on her own. **T. 11/7/14, pp. 11-14**

The court held an expedited review hearing on 11/26/14, where the agency reported that the maternal great-grandmother had again stated that she would take the children with the understanding that the mother would care for them. In

⁷ Carelink is an agency which provides comprehensive community based supports to youth and adults with serious emotional and behavioral health issues. www.carelinknetwork.org (accessed 1/22/16)

⁸ In its decision the Court of Appeals characterized Ms. Gibson's testimony about her efforts to transfer the case to NSO from Carelink as making "...excuses and blamed the agencies for providing inaccurate information..." **In re Hicks/Brown, supra at p. 5.** In fact Ms. Gibson had put in the order for respondent to be released from Carelink herself, she had followed up to have the release expedited, and she made herself available to help respondent with the application process. **T. 11/7/14, pp. 11-12.**

addition the worker reported that she was still working to have the mother released from the program at Carelink so that she could be enrolled at the NSO. Ms. Gibson had followed up on this referral with the change to NSO and that agency had noted that the mother was already receiving comparable services. At the conclusion of this hearing the court ordered that the agency file a termination petition as to both children. **T. 11/26/14, pp. 5-9, 13.**

Three months later, the agency had yet to file the termination petition. Ms. Gibson did report that she was making continuing efforts to transfer the mother's service's to the NSO, but the mother had to take some initiative in the transfer. **T. 2/20/15, pp. 10-14** The agency also reported that respondent had only attended 5 of the 12 visits scheduled with the children during the quarter. **Updated Court Report, 2/20/15.** Then, on 5/20/15, Ms. Gibson reported that the mother was in compliance with the therapeutic services offered by Franklin Wright Settlement, including individual therapy and assistance with obtaining housing and employment. The therapist had assisted the mother with this by personally taking the mother to fill out job applications. The worker continued her attempts to have the case transferred to the NSO, but the release from Carelink had been denied. However, Carelink continued to provide services to the mother. In addition the mother was receiving mental health services through Northeast Guidance. Ms. Gibson had contacted that agency which had informed her that they also provided services to developmentally delayed clients, comparable to those offered by the NSO. To receive these services the mother would simply need a new assessment. Ms. Gibson did express concerns about the mother's lack of consistent visitation and her

failure to attend GED classes. Based upon a request by respondent's counsel the court again ordered that respondent be provided with a parent partner.

T. 5/20/15, pp. 7- 13; Order Following Dispositional Review/Permanency Planning Hearing, Filed 5/20/15.

Termination Hearing

By 6/18/15 the agency had filed a termination petition as to both parents. **T. 6/18/15, pp. 4-11.** The hearing on the termination petition was held on 7/27/15. Respondent participated by telephone during the hearing because she had moved to Ohio. Ms. Gibson testified as the petitioner. By the time of the hearing she had been on the case for 14 months. Ms. Gibson summarized the elements of the treatment plan, which had originally had been adopted in January 2013. Ms. Brown had been ordered to participate in a Clinic for Child Study evaluation and she had completed that evaluation on 3/19/13. That evaluation recommended that:

It is suggested that she be provided with a parent peer mentor in addition to her therapist to provide her with additional support. She should continue to visit with her children twice per week, attend her therapy sessions, look for independent housing and complete her education. **Clinic for Child Study, 3/19/13, Admitted 4/23/13, p.6.**

The mother was also required to complete parenting classes. She had been referred three times, and she finally completed the classes in January 2014. Although Ms. Brown had completed these classes, she had not benefitted from them. Ms. Gibson explained that at times the mother was only physically present at the visits. She would let the children climb and jump on things and put things in their mouths. The children would also dart into traffic when leaving the building. The mother would not engage with the children at the visits. **T. 7/27/15, pp. 10-12.**

The mother had completed a psychological evaluation on 5/9/13 and a psychiatric evaluation on 5/30/13. The mother was also required to establish safe and suitable housing. When the children were originally placed into care the mother had reported that she was homeless. At the time of the termination hearing, which was more than three years later, she still did not have appropriate housing. The agency's workers had assisted the mother in filling out an application for Section 8 housing (subsidized housing), but the mother had never followed through with the application. The worker had also periodically attempted to help the mother get into a shelter, but Ms. Brown always resisted. The mother never explained why she would not go to a shelter, even though those programs could have also assisted her in getting permanent housing. **T. 7/27/15, pp. 13-14, 30, 47-48.**

The mother was also required to establish a legal source of income. The mother did not have a source of income when Destiny was originally placed into foster care and she never reported an independent source of income. She had worked with the therapist from Franklin Wright Settlement on securing a job. The therapist had helped her filling out job applications and had taken her to job sites. On at least one occasion the mother had failed to appear for a job orientation. The mother had been attempting to obtain a source of income by applying for SSI, and she had an attorney to assist her. However the mother reported that the attorney told her not to contact him anymore. The worker had tried to assist with the mother's application by providing a copy of the psychological for the attorney. **T. 7/27/15, pp. 22-24, 31,36.**

Ms. Brown had participated in therapy, primarily through Franklin Wright. The therapy had been ongoing up until right before the termination hearing when it had been suspended because the mother had left the state. Along with providing the individual therapy the therapist had come to the agency to observe some of the mother's visits with the children. She would provide the mother with parenting advice at these visits. The agency had also provided the mother with a parent partner for much of the case. This service was terminated in early 2015 because of lack of contact with the mother. The worker later learned that the mother had moved to Ohio on 7/3/15 and did not plan to return. **T. 7/27/15, pp. 25-26,45,50.**

The mother had been offered regular visitations with the children. From the beginning of Destiny's case in April 2012 until December of 2012 the mother had failed to visit with Destiny. After that the mother's visits had been inconsistent. Oftentimes she would cancel the visits. Even before she left for Ohio the mother had stopped visiting with the children, with her last visit with the children coming on 6/19/15. When the mother did visit she had difficulties interacting with the children. Sometimes she would come into the room and she would have to be told to interact with the children and she would have to be encouraged to interact with both Destiny and Elijah. During the visits the agency workers would have to supervise respondent and the children very closely, to make sure that the children were safe and that respondent and the children were behaving appropriately. Then after the visits the workers would talk to the mother about what had happened. **T. 7/27/15, pp. 17-18,20-21, 26, 43-44.**

Ms. Gibson testified that she had investigated various relatives for placement of the children, but none of them were suitable. The maternal great-grandmother had been contacted and she was not willing to care for the children, but she was willing to have the mother and the children stay with her with the mother caring for the children. The worker and the agency had determined that that was not safe for the children. The maternal grandmother had also been considered, but she was not appropriate because she had an open Protective Services case of her own. **T.**

7/27/15, pp. 32.

During the pendency of the case the worker became aware that the mother had some cognitive limitations, with Ms. Gibson stating that she understood that the mother was at the borderline range of cognitive functioning. In response she had helped the mother to fill out applications to switch her case over to a developmental disability program. This was part of a referral to the NSO, with the worker and the mother going over the application together. Ms. Gibson noted that Ms. Brown could read the application and Ms. Brown had stated that she understood what she was reading. Unfortunately the worker was not able to enroll Ms. Brown in the services at NSO, but she continued to receive mental health services at Northeast Guidance. Ms. Gibson learned that Northeast Guidance also had a program for developmentally delayed individuals for which the mother could apply. To facilitate this service the mother needed to have an evaluation. The worker provided the agency with the information needed for the referral but respondent did not cooperate. The mother's move to Ohio had prevented this change in program. **T. 7/27/15, pp. 38-40**

Ms. Gibson was the sole witness for the petitioner. The mother offered no witnesses. Following arguments by counsel the court made findings of fact and law. As noted by the Court of Appeals, respondent's counsel did claim, in her closing argument that reasonable efforts had not been made, but counsel did not state that respondent had a specific, identified disability or that the agency or the court had failed to properly accommodate a disability. **See T. 7/27/15, pp. 56-59** (Closing Argument by Ms. Gilfix, on behalf of respondent). The court terminated the appellant-mother's rights pursuant to **MCL 712A.19b(3)(c)(i) and 712A.19b(3)(g)**. The court also found that termination of the mother's rights was in the best interests of both children. The court also terminated the rights of the legal father of Destiny and the unidentified father of Elijah.

Subsequent Proceedings Below

Decision of the Court of Appeals

The mother Shwanda Brown appealed the case to the Court of Appeals. The Court of Appeals, in a decision released on 4/26/16, reversed the termination of Brown's parental rights to both children. The panel found that the Department of Health and Human Services and the court were aware of respondent having a disability but the agency service plan never specifically addressed that disability by providing reasonable accommodations. Because of this failure the panel found that the agency had failed in its duty to provide reasonable efforts to reunify the family and that without the reasonable efforts there was not sufficient clear and convincing evidence to support termination of Brown's parental rights. In doing so the panel

applied a de novo review analysis even though the issue was not properly preserved in the trial court. **In re Hicks/Brown, ___ Mich App. ___, Dkt. No. 328870 (Released 4/26/16)**

Continuing Proceedings in the Trial Court

Separate from the proceedings in the appellate court, the trial court continued to hold regularly scheduled review hearings. During the period after the termination hearing the agency made significant progress on facilitating an adoption of the children by the licensed foster parent. **See Order After Post Termination Review/Permanency Planning Hearing, 11/17/15; and 2/18/16.** After the decision by the Court of Appeals, which reversed the termination and reinstated the respondent mother's parental rights, the agency made renewed efforts to provide services to respondent. In particular the agency worker informed respondent of the agency's intent to provide her with specialized services to meet her specific needs. In order to accomplish this the agency requested a new psychological evaluation to assist with tailoring the services to respondent's needs. However, between late May and mid July 2016 respondent did not make herself available for this evaluation and respondent cancelled every appointment scheduled with the worker. Even when contacted, respondent expressed doubts that she would be able to visit with the children or comply with the treatment plan. Most significant was the fact that between 6/1/16 and 7/13/16 respondent was offered 7 visits with the children. Respondent did not attend any of the visits during that period of time. **Children's Foster Care, Updated Court Report, 7/18/16.**

(Attached)

Children's Argument

I. The Respondent-Mother Failed to Make a Timely Request for Accommodation of Her Disability in the Case Service Plan Prepared by DHHS Where She Never Specifically Identified Her Disability and She Never Claimed A Violation of the ADA and Respondent Would Not Have Been "Otherwise Qualified" Under the ADA

A. Standard of Review

The issues here involve both questions of fact, which are reviewed for clear error on appeal, **In re Trejo Minors, 462 Mich 341 (2000)** and questions of law, which are reviewed de novo. **McCormick v. Carrier, 487 Mich 180 (2010)**.

B. Analysis

1. Respondent's Claim Was Not Timely

In the leading case of **In re Terry, 240 Mich App. 14,26 (2000)** the Court of Appeals held that if a respondent-parent wishes to raise a claim of a violation of his or her rights under the Americans With Disabilities Act (the ADA), that claim should be raised when the service plan is adopted or soon thereafter. The children reiterate here that that should be the proper rule and that, as noted in the children's previously filed Application for Leave to Appeal, in particular **Children's Issue I, at pp. 17-19**. Moreover, this rule is consistent with the requirements of the applicable statutes and case law, both in Michigan and nationwide. **See In re Frey, 297 Mich App. 242, 247 (2012)** (applying the timeliness rule to general services provided to parents under the case service plan).

In a number of unpublished cases in the Court of Appeals, various panels have consistently held that any claim of a violation of the ADA must be made at the time that the original service plan is adopted or shortly thereafter so that the court

may address it. **In re Terry, supra at p.25.** In **In re Ali-Maliki, Dkt. No. 321420 (Released 2/19/15)** the court rejected a claim based upon the ADA which was not raised until the termination hearing, and the court noted that the trial court had ordered the petitioner to accommodate respondent's intellectual disability, yet respondent did not raise any claim that the petitioner's efforts were inadequate to comply with the ADA. Similarly, respondent here made a very belated request for a referral to the Neighborhood Service Organization, which the court granted, yet she never characterized this specifically as a potential violation of the ADA. **See T. 8/13/14, p. 13** In **In re L.F. Trotter, Dkt. No. 328457 (Released 2/18/16)** the court rejected a claim under the ADA where the respondent failed to request accommodation for her claimed disability for more than a year after she was assessed with a potential disability. **See also In re CR LeClaire, Dkt. No. 329565 (Released 4/19/16)** (again applying the preservation rule from Terry and finding that the respondent did not request ADA accommodations in the trial court.

Subsequent to the Court of Appeals decision in the instant case, panels of the court continued to apply the preservation rule set out in Terry. In **In re Detty, Dkt. No. 331131(Released 8/23/16)** the court considered a case where the respondent had been evaluated by a psychologist who found that she suffered from a variety of serious mental illnesses. The respondent failed to object to the services developed in the parent agency treatment plan and did not challenge those services until the appeal. The Court of Appeals held that respondent had waived any claim that she was not provided reasonable efforts and the court cited the decision in Hicks/Brown for supporting authority.

Finally, in **In re Winans, Dkt. No. 331336 (Released 7/28/16)** a panel of the Court of Appeals, *which included the author of the opinion in the instant case*, reiterated the preservation rule in Terry and held that the respondent parent failed to "... identify the rights specifically granted her by the ADA and to show that any rights she may have had under the ADA were violated by petitioner during the pendency of the proceedings." **In re Winans, supra, slip at p. 1.**

Cases from other states, which recognize the applicability of the ADA in child protective proceedings, have also emphasized that the claim should be raised in a timely manner. In **State of N.M. ex.rel. CYFD v. Johnny S. Sr., 204 P. 3d 769 (Ct. App. N.M., 2009)** the appellant father argued on appeal that his parental rights were improperly terminated because the agency failed to properly accommodate his mental impairments pursuant to the ADA. The New Mexico court affirmed the termination because the appellant failed to properly preserve the issue in the trial court. The court went on to note that the father had been diagnosed with depression and cognitive disorders during the pendency of the case. Despite this, the court found that the appellant's counsel failed to request an evaluation for the applicability of the ADA, and he failed to ask for any specific finding or conclusion of law that the appellant was a qualified individual within the meaning of the ADA. Nor did the court agree with an assertion that the trial court had an independent obligation to ensure that the issue was properly explored. The court concluded by holding that:

To preserve issues concerning violations of the ADA, the parent bears the initial burden of asserting that the parent is a qualified individual with a disability under 42 U.S.C. 1213(2). Thereafter, the parent must create a factual and legal record sufficient to allow meaningful appellate review of the

district court decision on the issue.
 At a minimum, however, there must be a request for relief citing the ADA
 backed by facts developed in the record. **State of N.M. ex rel. CYFD v.
 Johnny S., Sr. supra, at 770**

Similarly, In **In re Adoption of Gregory, 747 N.E. 2d 120 (Sup. Ct. Mass., 2001)**
 the Supreme Court of Massachusetts adopted a very similar rule requiring that the
 parent raise any claim of a failure to accommodate a disability in a timely manner
 and that the parent should make the claim specifically as a violation of their rights
 under the ADA or other antidiscrimination statutes. Failure to raise the claim in a
 timely and specific manner would bar the parent from raising the claims later in the
 case. **See also In re A.M., 22 P. 3d 185 (Mont. Sup. Ct. 2001); In re B.L.M. 114
 S.W. 3d 641 (Texas Ct. Apps, 2003).**

The lesson that these cases teach is that any claim by a parent that they have
 been aggrieved by a claimed failure to accommodate a disability in a child
 protection case must be raised early enough in the case that the claimed disability
 can be specifically determined and that proper accommodations can be made
 pursuant to the ADA. The respondent parent also has an obligation to identify his
 or her claim as one coming under the purview of the ADA. Here the respondent
 mother failed to do either. While the Court of Appeals took note that at the hearing
 on 1/15/14 respondent's counsel inquired about the mother receiving on-on-one
 parenting help, she made no mention whatsoever that this request was in any way
 pursuant to the ADA or that her client had any identifiable disability under the ADA.
See T. 1/15/14, pp. 5-20.

Eight months later counsel for respondent requested that the court order
 that respondent be referred for services at the Neighborhood Service Organization

(NSO)⁹. This was 20 months after the court adopted a treatment plan for Destiny and the respondent and 16 months after it adopted a similar plan regarding Elijah. Moreover counsel made no reference whatsoever to the ADA or to any specific disability protected by the Act or how the referral would provide appropriate accommodations under the ADA. Contrary to what the Court of Appeals asserted, this statement clearly did not preserve the issue either with sufficient specificity or in a timely manner. **In re Terry, supra; State of N.M. ex rel. CYFD v. Johnny S., Sr., supra.** Given this respondent failed to make a timely request for accommodation in the DHHS service plan.

2. Respondent Failed to Establish a Valid Claim Pursuant to the ADA

Not only did respondent fail to raise her ADA claim in a timely manner, but her claim fails under the requirements of the ADA. To make a valid ADA claim a plaintiff would have to show that:

- 1) She has a disability, 2) that she is "otherwise qualified" for the benefit that has been denied, 3) that she was either excluded for participation in or denied benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity's services, or activities, or was otherwise discriminated against by the public entity, and 4) that such discrimination was by reason of the plaintiff's disability. **See Lincoln CERPAC v. Health and Hospitals Corp, 920 F.Supp. 488,497 (S.D.N.Y., 1996)**

Respondent here would have difficulties meeting the "otherwise qualified" requirement because the benefit denied would be is her ability to parent her

⁹ In fact in another recent ADA case in the Court of Appeals the parent had been referred to the NSO as an agency that provided services for individual with cognitive and developmental disabilities. The court noted that the parenting classes, housing, employment and life skills services were not specifically tailored for persons with cognitive limitations, but were appropriate for individuals with cognitive limitations. **In re Smith/Ashford Minors, Dkt. No. 330732 (Released 6/21/16)** Respondent's request for a referral to this agency in no way was sufficiently specific to meet the requirements of **in re Terry, supra** or the ADA.

children, because the court found that the respondent here was not able to ("qualified") to parent her children. Respondent's claim would therefore fail under the ADA itself. **Southeast Community College v. Davis**, 442 U.S. 397 (1979); See **Jennifer Burke, Americans With Disabilities Act: An Alleged Violation of the ADA Should Not Be A Defense In A Termination of Parental Rights Proceeding**, 29 U.Balt. L.Rev. 347, 371-372 (2000)

II. DHHS Made Sufficient Reasonable Efforts to Reunify the Family As Required By MCL 712A.19a(2) Given Respondent's Potential Disabilities Where She Was Referred to a Variety of Services and Where Was She Afforded 2 and ½ Years to Complete the Services

A. Preservation of Issue

Respondent-mother preserved the issue of reasonable efforts in the trial court, but she failed to provide or argue any particular link between those efforts and any identifiable disability. **T. 7/25/15, pp. 56-59; See Children's Argument I, supra**. Unpreserved errors are reviewed for plain error affecting substantial rights. **People v. Carines**, 460 Mich 750 (1999)

B. Standard of Review

The question of whether or not reasonable efforts were made to reunify a family is reviewed for clear error. **In re Trejo Minors, supra; In re Fried**, 266 Mich

App. 535 (2005). In reviewing the determinations of the trial court deference must be given to that court's particular opportunity to judge the credibility of the witnesses before it. **In re Miller, 433 Mich 331 (1989).** In contrast, the appellate court here improperly substituted its judgment for that of the trial court on this important factual issue. **MCR 2.613(C).**

C. Analysis

1. Role of Reasonable Efforts in Termination Cases

The children have already discussed the extensive efforts that were made by the agency to attempt to reunite the children with the respondent mother. **See Children's Application for Leave to Appeal, Issue I.** The term, and the requirement, comes from the statute governing permanency planning hearings, **MCL 712A.19a(2)** which simply states that:

§19a(2) The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required. Reasonable efforts to reunify the child and family must be made in all cases except if any of the following apply:...

This reference to "reasonable efforts" comes directly from the federal statute, **42 U.S.C. 670 et.seq, (the Adoption and Safe Families Act or ASFA)**, and more particularly in **§ 671(a)(15)** which makes reference to "reasonable efforts" to both preserve and reunify families. **See also 45 C.F.R. 1356.21** (part of the federal regulations governing ASFA). This court has addressed the issue of the provision of "reasonable efforts" in both **In re Rood, 483 Mich 73 (2009)** and **In re Mason, 486 Mich 142 (2010)**. In those cases, the respondent-parents were not provided services or a case service plan, thus creating what this court characterized as "a hole in the evidence" on which the trial court based its termination decision. **See In re**

Rood, supra at 127. But that determination is simply not applicable here because the agency provided the respondent with case service plans throughout the case, as well as a variety of services. **T. 7/27/15, pp. 7-27, 30-32, 36-50.**

The question then becomes whether or not the services offered or provided to respondent were sufficient or “reasonable”. First, it must be emphasized that the term “reasonable efforts” is not defined in either state or federal law. That fact means that any alleged failure to provide those efforts is not enforceable in federal court as a private cause of action. **Suter v. Artist M., 503 U.S. 347 (1992); David Herring, Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System, 54 U.Pitt. L. Rev. 139 (1992); See also In re Rood, supra at pp. 129-131 (fn. 11)(C.)(J. Young, concurring in part).**

Second, courts in other states have more directly addressed the role that reasonable efforts play in termination cases. In **In re Kaliyah S. et.al., 455 SW.3d 533 (Sup. Ct. Tenn. 2015)**, the Supreme Court in Tennessee discussed the role that that state’s reasonable efforts provision played in termination proceedings. While the court there found that the reasonable efforts provision applied to the determination of whether termination of the parent’s rights was in the child’s best interests, the court provided an extensive history of the role that “reasonable efforts” played in both federal and state law, in particular in the Adoption and Safe Families Act (ASFA) and its predecessor, the Adoption Assistance and Child Welfare Act of 1980. The court noted that where some states had specific “reasonable

efforts” requirements in their termination statutes, children were trapped in their temporary foster care placements. **In re Kaliyah S. et.al., supra at p.543**

Similarly, in **In re D.C.D., 105 A. 3d 662 (Sup. Ct. Penn., 2014)**, the Pennsylvania Supreme Court found that the purpose of ASFA was to address the problem of foster care drift by ensuring that children moved more quickly through the dependency system and into permanent placements best suited to their individual situation. Given this the court found that the proper remedy for an agency’s failure to provide services is not to punish an innocent child by delaying permanency through denying termination, but instead to conclude that the agency had failed to make reasonable efforts which would impose a financial penalty on the agency. The court found that in balancing the parent’s rights and those of the children that the protection of children and in particular the need to provide permanency for dependent children, was a compelling state interest. **In re D.C.D., supra at 676.**

In **Emma D. v. State Dept. of Health and Social Services, 322 P. 3d 842 (Alaska Sup. Ct., 2014)**, the Alaska Supreme Court addressed the termination of parental rights in an appeal by a parent with mental health problems. On appeal the mother claimed that the state agency failed to take into account her disability in providing her with services, and that her rights under the ADA were violated. Moreover, in Alaska the state’s termination statute requires a finding of reasonable efforts as part of the elements of a termination case. The court in **Emma D.** found that the question of accommodation of a parent’s disability was included in the question of whether reasonable efforts had been made to reunite the family. In the

case the mother had been referred for mental health treatment, housing assistance, transportation assistance as well as regular visitation with her child. The parent failed to cooperate regularly with her treatment program as well as failing to visit regularly with her son. On appeal the Alaska Supreme Court affirmed the termination, finding that reasonable efforts had been made and that the fact that the mother had failed to cooperate with services also supported the termination decision. **Emma D., supra at 852; See In re Kayla N., 900 A 2d 1201 (R.I.Sup. Ct., 2006)**, (finding that the agency made reasonable efforts to provide services to cognitively impaired parents, regardless of the fact that the ADA did not apply in a termination case).

2. Reasonable Efforts Were Provided to the Respondent in This Case

In sum, the case law establishes that the question of "reasonable efforts" has only a limited role in a decision on the termination of parental rights, as long as the parent is actually provided with a case service plan and services. To the extent that reasonable efforts relate to the termination decision, that determination should be made on a case by case basis with deference being given to the findings of the trial court. Here the trial court consistently found that the agency provided the respondent with reasonable efforts and she never challenged those findings. The respondent had been provided a variety of services, many of which specifically addressed the fact that she had mental health issues as well as any cognitive limitations she may have had. Respondent was provided with parenting classes on a number of occasions. While she finally completed one of those sets of classes, she struggled with putting what she learned into the visits with the children. She had

difficulties with both relating to and controlling the children's behaviors at the visits. The agency workers addressed these problems by providing hands on direction at the visits, but to no avail. **T. 7/27/15, pp. 10-11, 20-21.** Moreover, she failed to visit regularly with the children, starting the case by not visiting between April and December 2012. Then at the end of the case respondent failed to visit for five weeks, from mid-June 2015 to the time of the termination hearing on 7/27/15. **T. 7/27/15, pp. 17-19, 22-24, 25-26 .¹⁰**

Similarly, the agency provided referrals for both psychological and psychiatric evaluations, which provided a basis for both the basis and nature of the subsequent services. **T. 7/27/15, p. 10** The agency also assisted respondent in her efforts to obtain a source of income, both by helping her to search for and apply for jobs, even to the point of transporting her to job interviews. The workers also assisted respondent in her application for SSI benefits and then assisted her in appealing the denial of the application. **T. 7/27/15, pp. 22-24** The agency provided regular in-home therapy for respondent, which continued up until the time that respondent left the state at the beginning of July 2015. **T. 7/27/15, p. 25-26, 36** Contrary to one of the major problems in **In re Rood, supra**, the agency consistently investigated various relatives for placement of the children, but these efforts were not successful. **T. 7/27/15, p. 32**

Significantly, the mother was being provided mental health services during much of the pendency of the case. At various times in the case she was receiving

¹⁰ As noted above, the respondent also failed to avail herself of the opportunity to re-establish her relationship with her children by failing to visit with the children after the Court of Appeals reversed the termination of her parental rights. **Children's Foster Care, Updated Court Report, 7/18/16.**

services from Carelink and Northeast Guidance Center (both of which provided services for respondent's mental health issues) and to Michigan Rehabilitation Services, an agency that provided services for persons with developmental disabilities. **T. 5/20/15, pp. 7-11; T. 7/27/15, pp. 20-21, 43-45.** The provision of these services satisfied the requirements of the A.D.A. and were themselves appropriate reasonable efforts pursuant to ASFA despite the fact that appellant has failed to make such a claim. **See Emma D. v. State Dept. of Health and Social Services, supra.**

Moreover, it was appellant's request for a referral to the N.S.O., albeit untimely (**See Children's Issue I, supra**), that jeopardized her involvement in these programs, because transfer to the N.S.O. required a release from the programs already in place for respondent. **T. 7/27/15.** She should not be able to complain now that she did not receive appropriate services when she essentially interfered with and delayed the kinds of services that she had requested. **Local Emergency Financial Assistance Loan Bd. V. Blackwell, 299 Mich App. 727 (2013).** Given the extent of the services that were provided to respondent and the fact that they were both specific to respondent's particular needs and they were modified as the case progressed, respondent was provided with reasonable efforts to reunify her with her children as provided by **MCL 712A.19a(2).**

III. The Potential Failure to Provide a Service Plan to Accommodate Respondent's Disability Did Not Provide Grounds For Reversal of the Termination Where There Was Sufficient Support For the Trial Court's Findings That Grounds For Termination Had Been Established And That The Termination Was In the Best interests of the Children

A. Preservation of the Issue

The respondent-mother did preserve the issue of the sufficiency of the evidence in the trial court. **T. 7/27/14, pp. 56-59** The respondent did not raise this issue on appeal and it should be considered to be abandoned. **Mitcham v. City of Detroit, 355 Mich 182,203 (1959); People v. McGraw, 484 Mich 120,131 (at fn. 36)(2009)**

B. Standard of Review

The question of whether or not there was sufficient evidence presented to support termination of parental rights is reviewed for clear error. **In re Trejo Minors, 462 Mich 341 (2000)** A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses. **In re BZ, 264 Mich App 286 (2004)** This issue also involves a question of law which is reviewed de novo on appeal. **In re Terry, supra**

C. Analysis

1. The Question of Accommodations of a Parent's Disability Is Separate From The Question of Proof of Grounds For Termination of Parental Rights

In the federal case of **Bartell v. Lohiser, 215 F. 3d 550 (6th Cir., 2000)**, a parent in Michigan filed a claim in federal court after her parental rights had been terminated. Part of the parent's claim was that her rights under the ADA had been violated because the agency failed to reasonably accommodate her disability. The

6th Circuit affirmed the dismissal of the mother's suit, finding that the termination decision in the trial court was based upon wide-ranging evidence relating to the mother's conduct, behavior, and history of abuse. Moreover, the agency had attempted to equip the mother with the skills necessary to care for her son by providing her with parental aides, parental classes, and psychological therapy.

Bartell v. Lohiser, supra at 560.

A number of state courts, when presented with ADA claims in parental termination cases, have also found that those claims do not undermine a finding of the sufficiency of the evidence to support termination. In **In re B.S., 693 A. 2d 716 (Vt. Sup.Ct., 1997)**, the Vermont Supreme Court addressed the applicability of the ADA in a termination proceeding and found that the Act did not apply to a termination case, noting that there was no specific discrimination against disabled persons in the TPR process. More particularly the court found that nothing in the ADA suggested that denial of TPR was an appropriate remedy for an ADA violation. **693 A. 2d at 721.** The Supreme Court of Hawaii reached the same result in **In the Matter of Jane Doe, 60 P.3d 285 (2002)**. In **Interest of Torrance P., 522 N.W. 2d 243 (Ct. Apps. Wisc, 1994)**, the court held that a determination of reasonable efforts under that state's termination statute was separate from any inquiry under the ADA. The court held that under the ADA Congress did not intend to change the obligations imposed by unrelated statutes. **Interest of Torrance P. at 246; see Stone v. Daviess County Div. of Children and Family Services, 656 NE. 2d 824 (Ct. of Apps. Ind., 1996)**

Given the established case law the proper rule should be that any question of a violation of the ADA should be separate from a court's determination of the sufficiency of the evidence in a termination case. The court can reasonably consider whether the agency has made efforts to reunite the family or if those efforts have simply not been made or are egregiously lacking the court on appeal can consider that in reviewing the sufficiency of the evidence. Here there was clearly sufficient evidence presented to support termination and the agency made appropriate efforts to reunite the family.¹¹ Those efforts included conscientious efforts to accommodate respondent's apparent limitations, including attempts to provide hands on direction to her during the visits by the agency workers and her therapist, providing direct assistance in the respondent's attempts to obtain employment and disability payments and attempts to obtain suitable housing. **T. 7/27/15, pp. 11-12, 20-13, 31,36**

2. There Was Sufficient Evidence Presented to Support Termination of Respondent-Mother's Parental Rights

First, it should be noted that respondent did not challenge the sufficiency of the evidence as it relates to the two statutory grounds relied upon by the trial court: **MCL 712a.19b(3)(c)(i) and 712A.19b(3)(g)**¹². Instead the appellant's claim is that because "reasonable efforts" were not made there was a "hole in the evidence" that foreclosed a decision on termination grounds. However, because there was in fact no such "hole" the evidence here did in fact support termination.

¹¹ Again it must be emphasized that respondent never challenged on appeal either the sufficiency of the evidence as to the grounds for termination or that termination was in the best interests of the children. **Respondent-Mother's Brief on Appeal, Dkt. No. 328870, Filed 12/4/15**

¹² Id.

The statutory grounds applicable here state that:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(c) The parent was a respondent in a proceeding brought under this chapter. 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

On this record there was ample support for termination of the appellant's rights on both statutory grounds. First, it must be emphasized that Destiny was a temporary ward of the court from 1/29/13¹³ to the termination hearing at the end of July 2015, a period of 30 months. Elijah was made a ward on 4/9/13, meaning that he was a temporary ward for 28 months. **T. 4/9/13, pp. 17-22** These extensive periods of foster care placement are well beyond the statutory requirement of 6 months under **MCL 712A.19b(3)(c)(i)** and also essentially twice the period of 15 months set out in **MCL 712A.19a**, which establishes a statutory presumption regarding a need for a termination petition. Equally significant was that the appellant was simply not ready to care for her children even after 2 ½ years of intensive services being provided by the agency and the court.

Second, appellant had not completed various elements of the treatment plan or she had failed to benefit from them. She had been referred three separate times

¹³ She had in fact been in placement for almost 10 additional months from her placement date of 4/10/12. **T. 4/25/12, p. 4.**

for parenting classes and she had finally completed the classes in January 2014. Even after completing the classes the mother had difficulties demonstrating an ability to properly supervise the children, even at the supervised agency visits. The mother would sometimes allow the children to jump or climb on things, they would be allowed to put things into their mouths and they had darted into traffic when leaving the facility. **T. 7/27/15, pp. 10-11.** Moreover, at these visits the agency workers would have to provide constant inputs and redirection to the mother, both because she had to be prodded to engage with the children and she would not do the basic child care activities such as changing diapers or assuring that they were safe. **T. 7/27/15, pp. 20-21.** Third, the mother had not been consistent with her visitations. At the beginning of the case she had not visited between April and December 2012. As the case proceeded she would often cancel her visits. By the end of the case the mother had failed to visit for almost 6 weeks, with her last visit coming on 6/19/15. **T. 7/27/15, pp., 17-18,26.**

The mother had also failed throughout the case to establish safe and suitable housing. When the case began the mother was homeless. By the time of the termination hearing the mother still did not have suitable housing. Up until July 2015 the mother had been staying with her uncle, but that home was never suitable for the children and she had never offered any home for evaluation by the workers. **T. 7/27/15, pp. 13, 30-31.** Similarly, the mother never had a source of income throughout the pendency of the case. **T. 7/27/15, p. 22.**

Given that the mother had never been able to provide a safe or suitable home for her children and her failure to comply with significant elements of the treatment

plan over a period of 2 ½ years, the court properly found that there was sufficient evidence to terminate her parental rights. **In re Trejo Minors, 462 Mich 341(2000); In re White, 303 Mich App. 701(2014); In re Powers, 244 Mich App. 111(2000).**

3. Termination of Respondent's Parental Rights Was in the Children's Best Interests

In the case of **In re Olive/Metts, 297 Mich App 35,42-43 (2012)**, the court laid out what factors should be considered by the trial court in making best interests determinations:

In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, ... the parent's parenting ability,... the child's need for permanency, stability, and finality,...and the advantage of a foster home over the parent's home. **(citations omitted)**

In addition the best interests determination must be supported by a preponderance of the evidence. **In the Matter of Moss Minors, 301 Mich App.76 (2013).**

The trial court here properly analyzed many of the relevant best interests factors. The judge found that the children had strong bonds with the foster parent, who were willing and able to adopt the children. In contrast the bond with the respondent had been weakening over time, to the point where they would not refer to her as "mom". The court also found that there were no relatives who were able to care for or adopt the children and that they had been in foster care for an extended period of time . All of these factors supported the court's finding that termination was in the children's best interests. **T. 7/27/15, pp. 66-70.**

The trial court's findings were supported by the record here. Both children had been in foster care for extended periods of time. Destiny was removed from the

mother's care in April 2012 and she remained in care until the termination hearing in late July 2015, a period of more than 3 years. Elijah had been placed into foster care after his birth in February 2013 and he remained in placement until July 2015, a period of almost 2 ½ years. **T. 4/25/12; T. 2/26/12; T. 7/27/15, pp. 29-30.**

During that extended period of time respondent struggled to comply with the elements of the treatment plan, and over the 2 ½ years that she participated in that plan she failed to make significant progress on it or show that she had benefitted from it. **T. 7/27/15, pp. 10-11, 29-30, 43-50 .**

Most significantly respondent failed to visit regularly with the children. At the beginning of the case respondent failed to visit Destiny from April 2012 to December 2012. **T. 7/27/15, p. 17.** Even after she began to visit with Destiny and then Elijah, she was often inconsistent in her visitations. When she did visit, respondent would struggle with interacting with the children and she had consistent difficulties controlling their behavior, to the point that the workers and sometimes her therapist would intercede to try to redirect her. **T. 7/27/15, pp. 11-12, 19-20.** Finally at the end of the proceedings respondent failed to visit for the 5 weeks before the termination hearing. **T. 7/27/15, pp.26-27.** Unfortunately, as a result of her failure to visit respondent's bond with the children diminished as the case wore on. **T. 7/27/15, p. 27.** In contrast, both Destiny and Elijah had been in the same foster home for an extended period of time and the foster parents were interested in adopting them. **T. 7/27/15, p. 29.**

Given all of this, the court's decision to terminate respondent's parental rights was in their best interests. The fact that there was an identified adoptive plan

and that the children were doing well in their placement supported the court's finding that termination was in the children's best interests. **In re Gonzalez/Martinez, 310 Mich App. 426 (2015)**. Moreover, given the fact that respondent had not been able to either substantially comply with or benefit from the treatment plan supported the court's best interests finding. **In the Matter of Moss Minors, supra**. Finally, the children needed a stable and permanent home and it was clear that respondent would not be able to provide one for the children. Given this termination was clearly in the children's best interests. **In re Frey, 297 Mich App. 42 (2012):**

4. Where There Was Sufficient Evidence to Support Both Grounds For Termination and Best Interests Any Failure to Accommodate Respondent's Disability Was Harmless Error

Given the evidence presented here, which supported the termination of respondent's parental rights and that the termination was in the children's best interests, any claimed failure to accommodate respondent's disability was at most harmless error.

In **In re Morris, 491 Mich 81,119 (2012)**, this court held that an automatic reversal rule would not be appropriate, where the trial court and agency failed to provide proper notice pursuant to the Indian Child Welfare Act. This court emphasized that such a rule would not be in the best interests of the children in most cases involving ICWA notice violations. In reaching this conclusion, this court cited **In re Osborne, 459 Mich 360 (1999)**. Osborne was a case where there had been a clear conflict in the representation of the respondent mother, where an

attorney had represented her at one point in the case, but later the same attorney acted as the prosecuting attorney in the termination case. This court vacated the decision of the Court of Appeals, which had found that the termination of the respondent's rights was improper. In doing so, this court emphasized both that rules of automatic reversal are disfavored and that the court would not set aside the results of the trial court proceedings in the absence of demonstrated harm. This court also emphasized that while the applicable rules of professional conduct were important, they had to be balanced against the clear interests of the child, particularly that there be an expeditious resolution of the case. **In re Osborn, supra at 368-369.**

The Court of Appeals has also adopted harmless error analysis in many termination cases. In **In the Matter of Hall, 188 Mich App. 217,223 (1991),** the court found that any error based upon a failure to involve counsel in one of the review hearings was harmless because the respondent failed to demonstrate prejudice. In **In re Gazella, 264 Mich App. 668 (2005),** the Court of Appeals held that while the trial court improperly suspended the effect of a termination order, that error was harmless. Similarly, in **In the Matter of Snyder, 223 Mich App. 85 (1997)** the court held that there was no miscarriage of justice demonstrated where the trial court had improperly admitted hearsay evidence relating to sexual abuse.

These decisions are consistent with the applicable court rule on harmless error. **MCR 2.613(A)** states that an error in the admission, exclusion of evidence or an error or defect in anything done or omitted by the court,

"...is not ground for granting a new trial, for setting aside a verdict, or vacating, modifying, or otherwise disturbing a judgment or order, unless

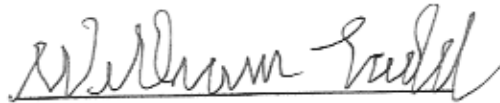
refusal to take this action appears to the court inconsistent with substantial justice.”

Given the fact there was more than sufficient evidence to support termination of respondent’s parental rights on one or more statutory ground and that the termination was in the best interests of the children, that decision was not inconsistent with substantial justice regardless of whether or not the agency failed to accommodate a potential disability, given the facts of this case. This is particularly true because the appellate court must consider the adverse affects on the children of any decision setting aside a termination. The rule against automatic reversals is particularly compelling in termination cases and it should lead to a conclusion here that termination of respondent’s parental rights was proper .

Relief Requested

For all of the foregoing reasons the children ask that this court should either peremptorily reverse the decision of the Court of Appeals and reinstate the termination order of the trial court or in the alternative to grant leave to appeal to this court.

Respectfully submitted,



William Ladd P30671

LGAL for Destiny Hicks and

Elijah Brown

Michigan Children's Law Center

One Heritage Place Ste. 210

Southgate, Mi.

Ph. 734 281-1900

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